

[1988–90 Gib LR 320]

**R. v. MINISTER FOR TRADE AND INDUSTRY and
FINANCIAL AND DEVELOPMENT SECRETARY, EX
PARTE NEW CAPITAL PROPERTIES (GIBRALTAR)
LIMITED**

SUPREME COURT (Kneller, C.J.): November 1st, 1990

Administrative Law—judicial review—grounds for review—refusal to consider question for determination constitutes failure to exercise discretion—differs from refusal to exercise discretion based on valid reasons

Administrative Law—judicial review—locus standi—recipient of loan shifting tax burden from lender to borrower has sufficient interest to apply for judicial review of refusal to grant exemption from income tax (under Income Tax Ordinance, s.7(1)(f))—not party to whom exemption prima facie applies

Administrative Law—judicial review—mandamus—mandamus lies only if authority has acted unlawfully, e.g. by failing to consider matter; misinterpreting law, basing decision on irrelevant consideration or failing to take account of relevant factors

Administrative Law—judicial review—natural justice—reasons for decision—no duty to give reasons for decision either generally or under Development Aid Ordinance—failure to give reasons when all other facts point in favour of different decision may lead court to infer that no rational reason for decision

SUPREME CT.

R. V. TRADE & INDUS. MINISTER

Taxation—income tax—exemption from tax—discretion under Development Aid Ordinance, s.7(1)(tf) to grant exemption from income tax on loan interest to be exercised in furtherance of economic and social benefit of Gibraltar—not to be exercised solely on basis of proposed occupancy of development—economic benefit not necessarily entailed by grant of development aid licence—social benefit not necessarily entailed by economic benefit

Taxation—income tax—exemption from tax—judicial review—recipient of loan shifting tax burden from lender to borrower has sufficient interest to apply for judicial review of refusal to grant exemption from income tax (under Income Tax Ordinance, s.7(1)(tf))—not party to whom exemption prima facie applies

The applicant sought an order of mandamus against the Minister of Trade and Industry and/or the Financial and Development Secretary directing them to approve the terms of its loan agreement for the purposes of the Income Tax Ordinance, s.7(1)(tf).

The applicant was a property developer which entered into a licence agreement with the Government to build apartments and four penthouses at Epram House; it was also given a development aid licence. To help finance the development, it obtained a loan of £4.5m. from County NatWest, the terms of which effectively put the tax liability on interest payments on the applicant. The applicant's request to the Financial and Development Secretary for his approval for an exemption from tax on the interest, in accordance with the terms of the Income Tax Ordinance, s.7(1)(tf) was refused allegedly because the paragraph had been amended. New Capital's renewed application was again refused. County NatWest required a copy of the certificate exempting the interest payments from tax before it could pay the loan to New Capital, although some advances were made, despite work not having begun on the building. New Capital sought judicial review of the Minister's and/or the Secretary's refusal to issue the certificate.

The applicant submitted that (a) although it was not the lender, it had *locus standi* to bring the application as it had a sufficient interest in the matter; (b) the loan and its terms and conditions were in accordance with the provisions of the Income Tax Ordinance, s.7(1)(tf), and the Minister should therefore approve the terms in order to secure the tax exemption; (c) the development had already been issued with a development aid licence, which barred the Minister and/or Secretary from refusing to approve the loan on the ground that it did not support Gibraltar's economic and social welfare; (d) the respondents' failure to give reasons for their decision indicated that in not considering the terms and conditions of the loan they had failed to exercise their discretion; and (e) the Minister and/or the Secretary had a discretion to approve the loan, and in cases such as the present, where the terms—which were not designed to

abuse the exemption provision in s.7(1)(tf)—had been negotiated at arm's length, ought reasonably to have exercised it in the applicant's favour.

The respondents submitted in reply that (a) they had a discretion as to whether to grant the exemption under s.7(1)(tf) of the Ordinance, which they had exercised consistently with the aims and objectives of the Ordinance, and without discriminating in favour of Government or joint venture companies; (b) the issue of a development aid licence did not necessarily demonstrate that the development supported the social development of Gibraltar as well as its economic development, as the requirement to demonstrate social development was not present in the Development Aid Ordinance; (c) they were under no duty (either imposed by the terms of either ordinance or generally) to give reasons for their decision; and (d) there had been no procedural unfairness in the exercise of their discretion.

Held, granting the application:

(1) The applicant had *locus standi* to bring the application. Although it was not the lender—to whom the exemption from income tax *prima facie* applied—the terms and conditions of the loan (requiring New Capital to pay the tax for County NatWest) were such that it had a sufficient interest in the matter to bring an application, satisfying the threshold requirement for standing set out in both the Rules of the Supreme Court, O.53, r.3(7) and in the relevant authorities (para. 23; para. 34).

(2) Judicial review was not a form of appeal, but a discretionary form of relief, which focused on the decision-making process rather than on the decision itself. An order of mandamus could only be made against the Minister or Secretary if it were shown that he had acted unlawfully, either by failing to consider the matter, by misinterpreting the law, by basing his decision on an irrelevant consideration, or failing to consider factors that he should have considered. There was no duty incumbent on the respondents to give reasons for their decision (either generally or imposed specifically by the ordinances in question), but a failure to give reasons when all the facts pointed in favour of a different decision could lead the court to infer that there was no rational reason for the decision (paras. 24–27; para. 29).

(3) The policy and objects of an ordinance were to be determined by reading it as a whole. It was clear that the policy and object of the Income Tax Ordinance was to impose and regulate the collection of a tax on incomes, and that that of the Development Aid Ordinance (which was to be read together with the Income Tax Ordinance) was to promote projects that would bring economic benefit to Gibraltar. A loan, the interest on which was to be the subject of an exemption from income tax under s.7(1)(tf) of the Income Tax Ordinance, had to promote the economic and social development of Gibraltar, and had to have its terms and conditions approved by the Minister in his discretion. The discretion was to be exercised in furtherance of the policy and objects of both ordinances, and

SUPREME CT.

R. v. TRADE & INDUS. MINISTER

the courts would protect those aggrieved by an exercise of discretion running counter to the policy of the ordinances. A change in Government policy was, where necessary, to be accompanied by an amendment to the ordinances (paras. 30–32).

(4) Although the proposed development was for the economic benefit of Gibraltar, in that 84 new dwellings were to be constructed, all of which would relieve the housing shortage and be subject to rates, this did not necessarily mean that there would be a social benefit to Gibraltar as well. This might depend on the sort of people who were likely to buy the apartments and penthouses, or whether the development were designed to alleviate the severe shortage of low-cost housing in Gibraltar. There was no statutory provision entitling the Minister or Secretary to base the exercise of his discretion solely on the basis of the proposed occupancy of the development, provided that it was for the social and economic development of Gibraltar (paras. 35–37).

(5) A refusal to exercise a discretion constituted a failure to exercise it. The Minister might legitimately decide, having read the terms and conditions of the loan, that they were not *bona fide*, that the loan was not for the development in question, or that the project was not for the economic and social benefit of Gibraltar. He could not, however, refuse to read the terms and conditions, or decline to approve them based on extraneous considerations. The respondents' failure to read the terms and conditions and (in the circumstances) their refusal to give reasons led the court to the conclusion that they had failed to exercise their discretion, or that they had exercised it based on extraneous considerations. The Minister should reconsider the application and exercise his discretion according to the law (para. 33; paras. 38–41).

Cases cited:

- (1) *Associated Provncl. Picture Houses Ltd. v. Wednesbury Corp.*, [1948] 1 K.B. 223; [1947] 2 All E.R. 680; (1947), 45 L.G.R. 635; 112 J.P. 55; 177 L.T. 641; 63 T.L.R. 623, observations of Lord Greene, M.R. applied.
- (2) *Chief Const. (N. Wales) v. Evans*, [1982] 1 W.L.R. 1155; [1982] 3 All E.R. 141, *dictum* of Lord Brightman referred to.
- (3) *Inland Rev. Commrs. v. National Fedn. of Self-Employed & Small Businesses Ltd.*, [1982] A.C. 617; [1981] 2 All E.R. 93, observations of Lord Wilberforce applied.
- (4) *Laker Airways Ltd. v. Dept. of Trade*, [1977] 1 Q.B. 643; [1977] 2 All E.R. 182; (1977), 121 Sol. Jo. 52, *dictum* of Roskill, L.J. referred to.
- (5) *McInnes v. Onslow Fane*, [1978] 1 W.L.R. 1520; [1978] 3 All E.R. 211; (1978), 122 Sol. Jo. 844, applied.
- (6) *Padfield v. Minister of Agriculture, Fisheries & Food*, [1968] A.C. 997; [1968] 1 All E.R. 694, observations of Megarry, V.-C. applied.
- (7) *R. v. Civil Service Appeal Bd., ex p. Bruce*, [1988] 3 All E.R. 686;

THE GIBRALTAR LAW REPORTS

1988–90 Gib LR

- [1988] ICR 649; on appeal, [1989] 2 All E.R. 907; [1989] ICR 171, *dicta* of Roch, J. and Dillon, L.J. applied.
- (8) *R. v. London County Council, ex p. Corrie*, [1918] 1 K.B. 68; (1917), 15 L.G.R. 889; 87 L.J.K.B. 303; 118 L.T. 107; 34 T.L.R. 21, applied.
- (9) *R. v. Captain of Port, ex p. Schiller*, Supreme Ct., Misc. Civ. App. No. 113 of 1988, unreported, referred to.
- (10) *R. v. Sylvester* (1862), 26 J.P. 151; 2 B. & S. 322; 121 E.R. 1093; 5 L.T. 794, applied.
- (11) *R. v. Trade Secy., ex p. Lonrho plc.*, [1989] 1 W.L.R. 525; [1989] 2 All E.R. 609; (1989), 5 BCC 633; 133 Sol. Jo. 724; [1989] New L.J. 717, observations of Lord Keith applied.
- (12) *Sharp v. Wakefield*, [1891] A.C. 173, applied.

Legislation construed:

Crown Proceedings Ordinance (1984 Edition), s.29(5): “This Ordinance shall not operate to limit the discretion of the court to grant relief by way of mandamus in cases in which such relief might have been granted before the commencement of this Ordinance, notwithstanding that by reason of the provisions of this Ordinance some other and further remedy is available.”

Development Aid Ordinance (1984 Edition), s.1: The relevant terms of this section are set out at para. 17.

s.10(1): “On considering an application for a licence, the Minister may grant the application if and to the extent that the applicant satisfies the Minister that the project fulfils the criteria specified in subsection (2) or (3), but shall otherwise refuse the application.

s.10(2): The relevant terms of this sub-section are set out at para. 18.

s.12: “Where the Minister grants a licence under s.10(1), the secretary shall issue to the applicant a licence, in the prescribed form and specifying the conditions (if any) on which it has been granted.”

s.14(1): “Where a licensee has complied with the conditions of the licence, he shall not be liable to pay income tax in respect of the gains and profits arising from the project to which the licence relates before the year of assessment in the basis period of which the aggregate gains and profits . . . first exceed the capital expenditure on the project, determined in accordance with this section.”

s.15(1): “Where the conditions of a licence that has been issued to a company have been complied with, no person specified in subsection (3) shall be liable to pay income tax on any dividend that is paid out of gains or profits of the company on which, by virtue of section 14, it is not liable to pay income tax.”

s.15A: “Where the conditions of a licence that has been issued to a licensee pursuant to section 10(2)(a)(iv), 10(2)(b), 10(2)(c) and 10(2)(d) have been complied with, the licensee shall not be liable to pay duty on the importation of goods into Gibraltar which the Financial and Development Secretary certifies are required for the

SUPREME CT. R. v. TRADE & INDUS. MINISTER (Kneller, C.J.)

purpose of setting up a project in respect of which the licence is granted.”

s.21 (repealed): “With effect from 15th February, 1988 licences under this Ordinance may only be granted in respect of projects referred to in section 10(2)(a)(ii).”

Finance Ordinance 1987 (1984 Edition), s.5:

“The Development Aid Ordinance is further amended by inserting after section 20 the following new section—

‘21. With effect from 15th February, 1988 licences under this Ordinance may only be granted in respect of projects referred to in section 10(2)(a)(ii).’”

Income Tax Ordinance (1984 Edition), s.3(1): The relevant terms of this sub-section are set out at para. 30.

s.7(1)(tf): The relevant terms of this paragraph are set out at para. 20.

Income Tax (Amendment) (No. 2) Ordinance 1985 (No. 26 of 1985), s.5: The relevant terms of this section are set out at para. 20.

Income Tax (Amendment) (No. 2) Ordinance 1989 (No. 28 of 1989), s.2: The relevant terms of this section are set out at para. 20.

Supreme Court Ordinance (1984 Edition), s.12: The relevant terms of this section are set out at para. 21.

Rules of the Supreme Court, O.53, r.3(7): The relevant terms of this sub-rule are set out at para. 23.

J.E. Triay, Q.C. and *J. Triay* for the applicant;
J.M.P. Nuñez, Crown Counsel, for the respondents.

1 **KNELLER, C.J.:** New Capital Properties (Gibraltar) Ltd. seeks an order of mandamus against the Minister of Trade and Industry and/or the Financial and Development Secretary, directing them or either of them to approve the terms of the loan agreement and grant an exemption pursuant to the Income Tax Ordinance, s.7(1)(tf); the defendants strenuously oppose the granting of such an order.

2 New Capital’s application, dated November 30th, 1989, for leave to apply for judicial review and mandamus sprang from the decision of the Minister and/or the Secretary made on September 25th, 1989 refusing to approve of a loan agreement made between the applicant and County NatWest. Leave was granted *ex parte* by this court on November 18th, 1989, and New Capital moved by a notice dated January 11th, 1990.

3 The grounds on which mandamus is sought are that—

(a) the loan made by County NatWest is a loan for the purpose of financing investment in a development project designed to promote the economic and social development of Gibraltar on usual commercial terms

and therefore in accordance with the terms of the Income Tax Ordinance, s.7(1)(tf), so the Minister should approve the terms thereof in a manner that the interest secured by County NatWest from New Capital should be exempt from tax;

(b) the development for which the loan has been granted has already been issued with a development aid licence which by its nature establishes that the development promotes the economic and social welfare of Gibraltar;

(c) insofar as the Minister or the Secretary has a discretion to approve the loan, that discretion ought reasonably to be exercised in cases where the loan is negotiated *bona fide* at arm's length on terms which contain no element of abuse of the exemption provided for and granted by s.7(1)(tf) of the Ordinance;

(d) it is not open to the Minister or the Secretary to refuse to approve the loan on the ground that the development is not for the economic and social welfare of Gibraltar, this being the subject-matter of the determination by which the Minister is bound inherently in the grant of a development aid licence.

4 The backdrop to this clash between New Capital and the Minister or the Secretary is this. The Government of Gibraltar and New Capital signed a licence agreement on March 31st, 1989. New Capital then had a licence to build 80 duplex apartments and 4 penthouses on the site of Epram House in Rosia Road. The licence agreement set out the terms and conditions of New Capital's licence.

5 New Capital was given a development aid licence under the provisions of the Development Aid Ordinance, s.12, on June 29th, 1989. This meant the Government had duly considered the tests set out in s.10 of that Ordinance for the grant of such a licence.

6 New Capital's solicitors, in their letter of July 20th, 1989 to the Secretary, revealed the news of a loan to New Capital made by County NatWest Ltd., of Drapers Gardens, Throgmorton Avenue, London for £4.5m. to help it to finance the Epram House Development. The advance was made, they added, on ordinary banking terms as to interest and so forth. They asked the Secretary for his approval under s.7(1)(tf) of the Income Tax Ordinance for exemption from tax on the interest to be paid by New Capital to County NatWest on the loan. On July 31st, 1989, the Secretary's answer was "No."

7 The author of that dispiriting reply was the Finance Officer, and he told New Capital's solicitors over the telephone that s.7(1)(tf) of the Income Tax Ordinance had been amended, and that New Capital should apply again. So off went another application from New Capital's solicitors on August 11th, 1989, which was politely acknowledged on August 18th.

SUPREME CT. R. v. TRADE & INDUS. MINISTER (Kneller, C.J.)

The Finance Officer wrote to New Capital's solicitors on September 25th, 1989, telling them that the second application had not been approved.

8 The solicitors asked the Finance Officer on September 29th, 1989—

(a) for his reasons for rejecting New Capital's application;

(b) whether the Minister had not approved the terms and conditions of the loan; and

(c) if not, for what reasons?

Copies of the correspondence between New Capital's solicitors and the Finance Officer went to the Attorney-General the same day, and their receipt was acknowledged on October 5th, 1989. The Attorney-General wrote to the solicitors the next day, October 6th, suggesting that the difficulty might have something to do with the repeal of s.21 of the Development Aid Ordinance, but that he would ask for instructions and write to them again.

9 Meanwhile the solicitors girded their loins, so to speak, to apply for judicial review. They wrote to the Attorney-General on October 18th and again on November 14th, asking for a reply; on November 24th, the Attorney-General gave it. It was the Secretary, he explained, and not the Minister, who had not approved of the terms and conditions of the loan. The Income Tax (Amendment) (No. 2) Ordinance 1989 substituted the Minister for the Secretary, but it had not been brought into operation by November 24th, 1989. This is incorrect. It came into force on November 23rd, 1989: see Legal Notice No. 94 of 1989.

10 The Secretary, continued the Attorney-General, had a discretionary power—but not a duty—to approve the terms and conditions of the loan. The Secretary considered each New Capital application and refused it. The Attorney-General went on in his letter to suggest to New Capital's solicitors that they were sure to agree that the Secretary was entitled to take whatever advice or make whatever enquiries he considered appropriate.

11 Turning back to the Ordinance, the Attorney-General pointed out that the Ordinance did not oblige the Secretary to give reasons for his decision, but he could do so if he wished, and that the Attorney-General would not advise him to give his reasons. He ended by suggesting that the solicitors should read the lengthy judgment of this court in *R. v. Captain of Port, ex p. Schiller* (9); but whether or not they did, it did not, in fact, deter them from applying for judicial review. But before doing so, one of the solicitors spoke on the telephone to the Attorney-General, who told him that the application was to be refused by the Minister, who would write and tell them so. He had not done so by December 1st, 1989.

12 The position of County NatWest, according to its solicitors, Vasquez,

Benady & Co., was that they had a photocopy of the development aid certificate by July 12th, 1989, and thereafter required a copy of the Commissioner of Income Tax's certificate under the Income Tax Ordinance exempting New Capital from deducting tax at source from the interest payable to County NatWest. On August 2nd, they reminded New Capital's solicitors that, until the certificate was wrested from the Income Tax Commissioner and the allotment of shares completed, New Capital could not draw down any of the £4.5m. loan. A letter of October 31st, 1989 from County NatWest's solicitors suggests, however, that some advances from the loan had been made to New Capital, although work had not begun on the building.

13 The Finance Officer in his affidavit of April 30th, 1990 declared that it had not been the practice of the Secretary to approve the terms of a loan on commercial terms made by a bank to a developer just because the developer had a development aid licence. He went on to explain that prior to May 7th, 1987, it was the policy of the then Secretary to base his decision as to whether he should approve the terms and conditions of a loan on whether it was in the public interest of Gibraltar to grant it. This approval was granted or withheld under the provisions of the Income Tax Ordinance, s.7(1)(f). The sub-paragraph came into effect on December 5th, 1985. So some applications submitted to him were approved, and some were not. He did not grant or withhold exemption from income tax, because that was the prerogative of the Commissioner of Income Tax.

14 On May 7th, 1987, the Finance Ordinance 1987 (No. 16 of 1987) was assented to by the Governor. It amended the Development Aid Ordinance by introducing a new s.21, which restricted the grant of development aid licences to projects that provided two or more housing units in Gibraltar. This came into effect on January 15th, 1988, for applications for licences made after February 15th, 1988. This may have been because there was a glut of new office accommodation. Then s.21 of the Development Aid Ordinance was repealed on March 2nd, 1989 by the Development Aid (Amendment) Ordinance 1989 (No. 4 of 1989), so that projects other than those for two or more additional housing units could be blessed with development aid licences.

15 Between November 1st, 1988 and April 30th, 1990 (the date of the Finance Officer's affidavit, it will be recalled) the Secretary had approved of only one application which had been made before November 1st, 1988, and this was in respect of a housing project the first phase of which had already been given approval. The Secretary, according to the Finance Officer, does not discriminate between Government joint venture company developers and private developers, and he has never given reasons for his approval or disapproval of the terms and conditions of these loans.

SUPREME CT. R. v. TRADE & INDUS. MINISTER (Kneller, C.J.)

16 So far as the interest payable on the loan is concerned, cl. 11.7 of the facility letter is in these terms:

“All payments to be made to the bank hereunder by the company shall be made free and clear of any deduction or withholding and if the company shall be required by law to make any deductions or withholding on account of any tax, duty, levy, import or otherwise from any such payment, the sum due from it in respect of such payment shall be increased to the extent necessary to ensure [that after] the making of such deduction or withholding the Bank receives a net sum equal to the sum which it would have received had not deduction or withholding been required to be made.”

New Capital, in effect, has to make good any income tax paid on the interest by the bank.

17 The statutory law is a dense thicket of Ordinances and amending Ordinances through which it is necessary for anyone hoping to discover the correct answer to New Capital’s application for judicial review to hack a path. The Development Aid Ordinance was assented to on July 23rd, 1981, and came into force on September 1st, 1981. Its long title is: “[A]n Ordinance to provide for relief from income tax in respect of income derived by approved projects for development in Gibraltar.” It states, in s.1, that it is to be “read with and deemed to be part of the Income Tax Ordinance.”

18 If the applicant obtains a Development Aid licence and complies with its conditions, he is not liable to pay income tax in respect of a certain part of the gains and profits arising from the project to which the licence relates (s.14) or dividends paid out of it (s.15). The licensee is not liable to pay duty on imported goods into Gibraltar which the Secretary certifies are required for setting up the licensed project (s.15A). The criteria for the grant of such a licence are set out in s.10(2)–10(3). It is s.10(2) which is the relevant one for this application, and it reads thus:

“The criteria to which subsection (1) refers are as follows:

- (a) the project in respect of which the application is made shall be a new project the effect of which is—
 - (i) to create a tangible and immovable asset in Gibraltar that will remain in existence after the applicant has ceased to derive the benefits that would be conferred by the issuing of the licence; and
 - (ii) to provide more than two additional units of housing accommodation in Gibraltar; or
 - (iii) to contribute materially to the development of the tourist industry in Gibraltar; or

THE GIBRALTAR LAW REPORTS

1988–90 Gib LR

- (iv) to provide any new industry in Gibraltar; or
- (v) to afford new employment opportunities or career prospects in Gibraltar; or
- (vi) otherwise to improve materially the economic or financial infrastructure of Gibraltar; and
- (b) the project shall be one which is for the economic benefit of Gibraltar; and
- (c) the project shall be one which—
 - (i) . . . will be completed within a period of two years following the issue of the licence and on the execution of which the applicant will expend not less than [£150,000] or;
 - (ii) . . . will be completed within a period of five years following the issue of the licence and on the execution of which the applicant will expend not less than [£500,000];
 - (iii) in the case of a project referred to in paragraphs (a)(iii) to (a)(vi) above, will be completed within a period of two years following the issue of the licence and on the execution of which the applicant will expend not less than £500,000;
 - (iv) in the case of a project referred to in paragraph (a)(iii) to (a)(vi) above, will be completed within a period of five years following the issue of the licence and on the execution of which the applicant will expend not less than £1,000,000.
- (d) the proposed management for the project shall be such as to be likely to be effective and competent.”

19 But with effect from February 15th, 1988, licences under the Ordinance could only be granted in respect of projects referred to in s.10(2)(a)(ii), which were for the provision of more than two additional units of housing accommodation in Gibraltar: this restriction was effected by s.5 of the Finance Ordinance 1987, which was assented to on May 7th, 1987, and embodied in an amendment to the Development Aid Ordinance by adding it as s.21 of that Ordinance. The restriction was lifted on March 2nd, 1989, when, by s.2 of the Development Aid (Amendment) Ordinance 1989, s.21 was repealed.

20 The long title of the Income Tax Ordinance explains that it is “an Ordinance to impose a tax upon Incomes and to regulate the collection thereof.” Section 7(1) sets out the various exemptions to which was added

SUPREME CT. R. v. TRADE & INDUS. MINISTER (Kneller, C.J.)

on December 5th, 1985—but with effect from July 1st, 1985—a new paragraph by the Income Tax (Amendment) (No. 2) Ordinance 1985. It was para. (tf), and this is what it said:

“if any interest received by any person (whether resident or non-resident) in respect of any loan made by him to any person for the purposes of a development project for which a licence has been issued under Section 12 of the Development Aid Ordinance 1981, where the terms and conditions of such loan have been approved by the Financial and Development Secretary . . .”

That para. (tf) in s.7(1) was amended by the Income Tax (Amendment) (No. 2) Ordinance 1989, s.2, which repealed it and substituted for it this one:

“any interest received by any person (whether resident or non-resident) in respect of any loan made by him to any person for the purpose of financing investment in development projects designed to promote the economic and social development of Gibraltar, where the terms and conditions of such loan have been approved by the Minister for Trade and Industry . . .”

21 The Supreme Court, “in addition to any other jurisdiction conferred by [the Supreme Court Ordinance] or any other Ordinance, within Gibraltar . . . possess[es] and exercise[s] all the jurisdiction, powers and authorities which are from time to time vested in and capable of being exercised by Her Majesty’s High Court of Justice in England” (Supreme Court Ordinance, s.12).

22 It has the same supervisory jurisdiction in Gibraltar over the decision of inferior courts, tribunals or persons charged with the performance of public acts and duties. The procedure here for applications for judicial review is also governed by the Rules of the Supreme Court, O.53. Thus relevant English decisions, though not binding, will usually be persuasive.

23 The applicant must show that it has *locus standi*. This is a threshold requirement. It is a question of fact and law. Order 53, r.3(7) of the Rules of the Supreme Court provides that “the Court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates.” The test is whether the applicant has “sufficient interest to complain of what has been done or omitted.” If not, leave to apply should not be granted: *Inland Rev. Commrs. v. National Fedn. of Self-Employed & Small Businesses Ltd.* (3) ([1981] 2 All E.R. at 98, *per* Lord Wilberforce).

24 Once over that hurdle, the applicant will discover that judicial review is, in the words of Dillon, L.J., “essentially discretionary relief”: *R. v. Civil Service Appeal Bd., ex p. Bruce* (7) ([1989] 2 All E.R. at 912). It is

not an appeal, as its words imply: *Padfield v. Minister of Agriculture, Fisheries & Food* (6).

25 Furthermore, it is not concerned with the decision, but the decision-making process, and unless this restriction on the power of the courts is observed, the court will, “under the guise of preventing the abuse of power, be itself guilty of usurping power”: *Chief Const. (N. Wales) v. Evans* (2) ([1982] 1 W.L.R. at 1173, *per* Lord Brightman). *Padfield* also serves as authority for the proposition that this court should not express an opinion as to whether the decision was wise or unwise.

26 There is no general duty to give reasons for decisions, and the Development Aid Ordinance and Income Tax Ordinance do not oblige the Minister or the Secretary to give reasons for their approval or disapproval of the terms and conditions of a loan for a project that is for the economic or economic and social benefit of Gibraltar. As Lord Keith said in *R. v. Trade Secy., ex p. Lonrho plc.* (11) ([1989] 2 All E.R. at 620)—

“the absence of reasons for a decision where there is no duty to give them cannot of itself provide any support for the suggested irrationality of the decision. The only significance of the absence of reasons is that if all other known facts and circumstances appear to point overwhelmingly in favour of a different decision, the decision-maker who has given no reasons cannot complain if the court draws the inference that he had no rational reason for his decision.”

See also the judgment of Megarry, V.-C. in *McInnes v. Onslow Fane* (5) ([1978] 3 All E.R. at 218–220).

27 That said, however, if the Minister or Secretary does not give reasons, he may be in a worse position, for the exercise of his discretion can still be questioned: in the words of Lord Hodson in *Padfield* (6) ([1968] 1 All E.R. at 712), he “would not escape from the possibility of control by mandamus through adopting a negative attitude without explanation.” Roch, J., in *R. v. Civil Service Appeal Bd., ex p. Bruce* (7) ([1988] 3 All E.R. at 702), remarked that “if the reasoning is stated shortly and factually, [it] would avoid the creation of a body of precedent . . .” which is presumably why the Minister or Secretary does not give reasons; even brief and factual reasons would generate a sense of fairness.

28 Mandamus is an order requiring an inferior court or tribunal or a person or body of persons charged with a public duty to carry it out. The Crown Proceedings Ordinance, s.29(5) provides that an order of mandamus cannot be made against the Crown, but that it may be made against an officer of the Crown who is obliged by statute to do some ministerial or administrative act which affects the rights or interests of the applicant.

29 An order can only be made against the Minister or Secretary if it is shown that in some way he acted unlawfully, *i.e.* that (a) he failed or

SUPREME CT. R. V. TRADE & INDUS. MINISTER (Kneller, C.J.)

refused to apply his mind to or consider the matter; or (b) he misinterpreted the law or proceeded on an erroneous view of it; or (c) he based his decision on some wholly extraneous consideration; or (d) he failed to have regard to matters which he should have taken into account. See the remarks of Lord Greene, M.R. in *Associated Provncl. Picture Houses Ltd. v. Wednesbury Corp.* (1) ([1947] 2 All E.R. at 683), and also *Padfield* (6) and *Lonrho* (11).

30 The policy and objects of an ordinance are determined by construing it as a whole, and that construction is a matter of law for the court. It is clear that the policy and object of the Development Aid Ordinance is to promote projects which will bring economic benefit to Gibraltar; one such project would be the building of more than two additional units of housing accommodation. The policy and object of the Income Tax Ordinance is to impose a tax upon incomes and to regulate its collection. The Governor has, in accordance with the power granted him by the Income Tax Ordinance, s.3(1), appointed a Commissioner “for the due administration of [the] Ordinance,” and the Commissioner is “responsible for the assessment and collection of [income] tax and . . . [the payment] thereof into the Treasury for the credit of the Consolidated Fund.” Income that is exempted by law from this assessment includes (as provided by s.7(1)(f) of the Ordinance) any interest—

“received by any person (whether resident or non-resident) in respect of any loan made by him to any person for the purpose of financing investment in development projects designed to promote the economic and social development of Gibraltar, where the terms and conditions of such loan have been approved by the Minister . . .”

31 There are three points to notice there. First, the loan must be for financing a development project “designed to promote the economic and social development of Gibraltar”; it is the Minister who decides whether this is the case. The Development Aid Licence is for a project that provides more than two additional housing accommodation units in Gibraltar and is for the economic benefit of Gibraltar. Secondly, the terms and conditions of the loan have to be approved by the Minister. Thirdly, the Minister has to exercise his discretion when he comes to decide whether or not he approves of the terms and conditions of the loan.

32 This discretion has been conferred on the Minister or Secretary by the legislature with the intention that it should be used to promote the policy and objects of both ordinances, which are to be read together. So it is the duty of the Minister or the Secretary not to act so as to frustrate the policy and objects of the ordinances, for that would be *ultra vires*. If the discretion is used to thwart or run counter to the policy and objects of these ordinances, the court will protect those aggrieved by this. Government policy may change—and in doing so reverse, in good faith and

pursuant to public duty, previous policy—provided that the new policy is still within the policy and objects of both ordinances. If not, the relevant provisions of one or both ordinances should be amended, as was done when s.21 was added to the Development Aid Ordinance on May 7th, 1987 and repealed on March 2nd, 1989, or else, as Roskill, L.J. put it in *Laker Airways Ltd. v. Dept. of Trade* (4) ([1977] 2 All E.R. at 206), the decision-maker will resort “to achiev[ing] by . . . the back door that which cannot lawfully be achieved by entry through the front.”

33 Finally, a refusal to exercise a discretion is a failure to exercise it. Thus, for example, justices at licensing sessions cannot pass a general resolution to refuse a certificate to every applicant for an ale and beer house licence who refuses to take out also a licence for the sale of spirits: *R. v. Sylvester* (10); *Sharp v. Wakefield* (12) ([1891] A.C. at 180). Nor can a council by general resolution cancel existing permits to sell literature at meetings in its parks and open spaces and decide that no new permits will be issued from a certain date. Its members must decide each application on its merits in accordance with the relevant bye-laws, thus preserving the right to be heard: *R. v. London County Council, ex p. Corrie* (8).

34 So much for the relevant principles I have extracted from the English decisions cited by counsel and which I have summarized for this application. The first issue to resolve is whether New Capital has any *locus standi* in this application for judicial review. It is not the lender of the money, and does not receive the interest on it. County NatWest is the lender and receives the interest, and so far it has not applied for the exemption. But New Capital’s complaint is that because the Minister or Secretary refused to approve the terms and conditions of the loan, the Commissioner is not bound to exempt from tax the interest that New Capital must pay County NatWest on the loan, so, by cl. 11.7 of the loan facility letter, New Capital must pay the interest and the tax to County NatWest. That is New Capital’s complaint. New Capital, therefore, has a sufficient interest and *locus standi* in the matter. There is no suggestion that the Minister or Secretary refused to approve the terms and conditions of the loan because New Capital and not County NatWest asked him to do so.

35 Notice should be taken of the fact that for a licence under s.12 of the Development Aid Ordinance, the project has to be not only for the construction of two or more additional units of housing accommodation in Gibraltar, but also one which is for the economic benefit of Gibraltar. New Capital’s project is for the construction of 80 duplex apartments and 4 penthouses, seemingly in place of one house. The owners of those apartments and penthouses will have to pay rates on them, and New Capital was licensed under the Development Aid Ordinance, s.12 for this project on June 29th, 1989, and became entitled to various concessions under that Ordinance which I need not rehearse.

SUPREME CT. R. V. TRADE & INDUS. MINISTER (Kneller, C.J.)

36 New Capital submits that its housing project is not only for the economic benefit of Gibraltar but also, *ipso facto*, for the social benefit of Gibraltar, as s.7(1)(f) of the Income Tax Ordinance requires. I cannot agree. Whether or not additional units of housing accommodation are for the social benefit of Gibraltar would depend, in my judgment, on what sort of people would be likely to buy them, and whether they would live in them and for how long they would do so each year. That, in turn, would depend in part on the sale price of the units and the standard of the building works and their furnishings (if any). If, for example, the answers to those questions were such that honest hard-working company directors and their families would buy and occupy them the year round, the project would be for the social benefit of Gibraltar; but if foreign drug smugglers were likely to purchase them and use them as storerooms or occasional transit rooms, clearly the project would not be for the social benefit of Gibraltar. And it would be proper to ask if there were any need for additional housing units of that sort.

37 Again, of course, if the project is for additional units of housing accommodation that are to be sold or leased to people with low incomes, that would manifestly be for the social benefit of Gibraltar, since such accommodation here today is still restricted and overcrowded. The Ordinances do not say, however, that a housing project for people with low incomes to buy or rent is the only sort which now qualifies as a project for the economic and social benefit of Gibraltar, so it would be illegal for the Minister or Secretary to exercise his discretion against loans for projects that were for additional units or housing accommodation for people with middle or high incomes, provided that the projects were also for the economic and social benefit of Gibraltar, because that would be achieving by the back door something that he could not achieve by entry through the front door. The ordinances (or one of them, at least) would have to be amended, perhaps with another s.21, which would make the exercise of the discretion in that exclusive way not only legal but clear to intending applicants for his approval of the terms and conditions of their loans.

38 Before the interest on the loan for the project is exempted by the Commissioner, the Minister must be satisfied that—

- (a) the loan is for the purpose of financing a development project;
- (b) the project is designed to promote the economic and social development of Gibraltar; and
- (c) he approves of the terms and conditions of the loan.

So far as the terms and conditions of the loan are concerned, they must reflect the fact that the loan is for the project—a project that is for the economic and social benefit of Gibraltar in the sense that I set out earlier—and not for any other purpose, and that they are the usual

market-rate terms of loans, or loans negotiated at arms length. It would be illegal for the Minister to say: “I will not look at the terms and conditions of the loan. I do not like the project. I do not like the borrower. I do not like the lender. He or it can afford to pay the tax,” and so forth. He may decide, having studied the terms and conditions, or having had them carefully analysed for him: “I have considered the terms and conditions of this particular loan. They are not *bona fide* ones. The loan is only a bridging loan, or not for this project. The project is not for the economic and social benefit of Gibraltar.”

39 The Minister or Secretary has not revealed his reasons for not approving the terms and conditions of the loan. He has not said that the terms and conditions are unsatisfactory, or that the loan is not for the Epram House project, or that the project is not for the economic and social benefit of Gibraltar. He has remained silent. The Finance Officer in his affidavit has only asserted that there has been no discrimination in favour of Government and joint venture companies, and that the court accepts is true.

40 New Capital’s solicitors have not sent a copy of the loan facility letter to the Minister or Secretary, which is surprising, and the Minister or Secretary, not having seen a copy of the terms and conditions, refused to approve the loan’s terms and conditions without reading them. This indicates, in my view, that the decision not to approve them was not made in the manner required for a public duty such as this.

41 The court does not express any opinion on whether the decision was wise or unwise. Nor will it make the decision itself, since that power was given to the Minister by the legislature and the court must not usurp it. What the court will do in the exercise of its discretion is to order the Minister to reconsider the application of New Capital for his approval of the terms and conditions of its loan facility with County NatWest when New Capital sends them to him, and to exercise his discretion under the Income Tax Ordinance, s.7(1)(tf) according to the law that I have set out in what is undoubtedly a lengthy judgment but is, I trust, a helpful one. The costs of the application are to be paid by the respondents to the applicant.

Application granted.